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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAN MORALES, Attorney General of Texas,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PUBLIC CITIZEN AND AVIATION CONSUMER ACTION PROJECT AS AMICI CURIAE SUPPORTING PETITIONER

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World Airways, Inc. v. International Brotherhood of Teamsters, 578 F.2d 800 (9th Cir. 1978) 23

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Civil Aeronautics Board Practices and Procedures: Report of the Subcomm. on Adminsitrative Practice and Procedure of the Sen. Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 3
House Comm. on Public Works and Transportation, *Legislative History of the Airline Deregulation Act of 1978*, 96th Cong., 1st Sess. (May 1979)(Serial No. 96-5) 13
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14 C.F.R. § 204.2(m)(1991) 20
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14 C.F.R. § 298.21(c)(iv)(1991) 20
14 C.F.R. Part 399(1991) 5
14 C.F.R. § 399.84(1991) 5, 26-27
14 C.F.R. § 399.110(1991) 25

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Other Authorities:

S. Breyer, *Regulation and its Reform* (1982) 3
Levine, "Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy," 4 *Yale J. Reg.* 393 (1987) 3
Transportation Research Board, *Winds of Change: Domestic Air Transport Since Deregulation* (1991) 3

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BRIEF OF PUBLIC CITIZEN AND AVIATION CONSUMER ACTION PROJECT AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF AMICI CURIAE

Public Citizen is a consumer organization with over 100,000 members nationwide, and Aviation Consumer Action Project is the only non-profit consumer group working full-time on aviation issues. Both groups advocated passage of the Airline Deregulation Act of 1978, the statute at issue here, and over the past 20 years, both groups have frequently testified before Congress and appeared before federal agencies on issues of concern to the flying public, including airline advertising practices. They have also taken part in other litigation raising the question presented in this case, as well as cases which involve preemption claims and other

passenger rights, including *West v. Northwest Airlines*, 923 F.2d 657 (9th Cir. 1991), *pet. for cert. pending*, No. 91-505. The parties have consented to the filing of this brief.

STATEMENT OF THE CASE

A. *The Proceedings Below.*

In November 1988 the Attorney General of Texas wrote to several of the airline respondents, stating that certain of their advertisements violated Texas laws proscribing false advertising and deceptive practices. The focus of his concern was advertisements which touted a particular fare in large type, while relegating to the fine print the $23 in surcharges which a passenger must pay on top of the advertised price. The airlines responded by seeking and obtaining pre-enforcement injunctive relief from the United States District Court for the Western District of Texas on the ground that Texas law was preempted by federal law. That injunction was later expanded to cover 33 other attorneys general who had expressed an intent to enforce their own deceptive practices laws according to certain prosecutorial guidelines regarding airline advertisements which had been adopted by the National Association of Attorneys General in 1987.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's grant of both preliminary and permanent injunctive relief against the Attorney General of Texas and the other attorneys general. The Fifth Circuit concluded that state law was expressly preempted by section 105 of the Federal Aviation Act, 49 U.S.C. App. § 1305, which preempts state laws "relating to rates, routes, or services" of airlines. The court of appeals read this "relating to" language as broadly preempting any state law which "has a connection with or reference to" airline rates, routes or services (Pet. App. 33a).

Before explaining in the Argument why there is no preemption here, we set forth the regulatory scheme governing the airline industry and describe the specific actions which federal agencies have taken in the area of airline advertising.

B. *The Statutory Framework.*

Economic regulation of the airline industry began with enactment of the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973. That act created the Civil Aeronautics Authority, which was charged with regulating airline routes and rates; it was renamed the Civil Aeronautics Board ("CAB") two years later. *See* Reorg. Plan No. IV of 1940, § 7, 54 Stat. 1235. Commercial aviation was still a fledgling industry in 1938 and was threatened by the heavy price cutting that marked the Depression-era economy. Congress thus decided to nurture this industry by adopting a public utility style of regulation similar to that imposed on other transportation industries. In a nutshell, airlines could not charge a fare unless it had been filed and cleared by the CAB, nor could a company enter the airline industry or start a new route unless it could show to the Board that new service was "required by the public convenience and necessity," a demanding standard which placed the burden of proof on the new entrant, who had to show that the new service would not hurt incumbent airlines. *See* S. Rep. No. 95-631, 95th Cong., 2d Sess. 1-5 (1978)("Senate Report"); H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 1-6 (1978)("House Report").[1]

This form of regulation remained in effect for the next 40 years. In 1958 Congress superseded the 1938 act with the Federal Aviation Act (the "Act"), Pub L. No. 85-726, 72 Stat. 731, 49 U.S.C. App. § 1301 *et seq*. The 1958 Act created what is now the

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[1] The history of domestic aviation and CAB regulation has been chronicled in many places, both before and after the Airline Deregulation Act of 1978. A 1975 Senate Subcommittee report, which was influential in the deregulation debate, made a detailed critique of CAB's regulation and outlined the need for reform. *Civil Aeronautics Board Practices and Procedures: Report of the Subcomm. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975). The chief counsel of that subcommittee later wrote a useful analysis of the shortcomings of CAB regulation and how the Deregulation Act addressed them. *See* S. Breyer, *Regulation and its Reform* 197-221 (1982). More recent commentaries which detail the industry's evolution until 1978, what the Deregulation Act sought to accomplish, and what has happened since then include a recent report by the Transportation Research Board, a unit of the National Academy of Sciences, entitled *Winds of Change: Domestic Air Transport Since Deregulation* (1991), and Levine, "Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy," 4 *Yale J. Reg.* 393 (1987).

Federal Aviation Administration and focused primarily on safety issues, but it also reenacted without substantive change the 1938 statute under which the CAB regulated airline economics and operations. *See* H. Rep. No. 2360, 85th Cong., 2d Sess. 1 (1958).

Twenty years later, Congress decided that the CAB's economic regulation of the industry had outlived its usefulness and enacted the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (the "Deregulation Act"). This law amended the Federal Aviation Act to replace public utility-style regulation with a market-oriented approach which gave airlines freedom to set their fares and to enter or exit particular markets. *See generally* Senate Report at 1-5, House Report at 1-5 and note 1, *supra*. The Deregulation Act also contained a "sunset" provision which phased out the CAB's regulatory functions and required the agency to close its doors by the end of 1984, with certain residual functions (such as regulating international routes and rates, approving airline mergers and administering a subsidy program for small community service) assigned to other agencies, principally the Department of Transportation ("DOT"). 49 U.S.C. App. § 1551. Of relevance here, the 1978 Act added a new section 105 to the Act, 49 U.S.C. App. § 1305, which sought to preempt state laws "relating to rates, routes, or services." In doing so, however, it retained intact section 1106 of the Act, a saving clause which had been on the books since 1938 and which expressly preserved "the remedies now existing at common law or by statute." 49 U.S.C. App. § 1506. The interaction of these two statutes is the core issue in this case.

Apparently by oversight, the Deregulation Act made no provision for transferring the CAB's power to police anti-competitive, unfair or deceptive practices, which the Board had authority to regulate under section 411 of the Act, 49 U.S.C. App. § 1381. Fearing that existing consumer protection rules would disappear when the CAB closed in 1984 and that the federal government would be powerless to move against anti-competitive or deceptive practices, Congress passed the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703. This statute gave DOT the Board's authority under section 411 and preserved existing CAB rules on such matters as overbooking, lost luggage, false advertising and charter tours.

C. *Federal Regulation of Airline Advertising.*

Section 411 of the Act empowers DOT to investigate "whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." If DOT makes such a finding, it shall "order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition." 49 U.S.C. App. § 1381. That provision, first included in the 1938 Act and carried forward intact through subsequent rewrites, is based on section 5 of the Federal Trade Commission Act, which charges the FTC with regulating unfair and deceptive practices in other industries. *See Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 303 (1963).[2]

Acting pursuant to section 411, the CAB and DOT have adopted policy statements which identify certain practices as violating that statute. *See* 14 C.F.R. Part 399 (1991). Of relevance here is 14 C.F.R. § 399.84, which declares it unlawful to advertise the price of air transportation, a tour or tour component (such as a hotel stay) "unless the price stated is the entire price to be paid by the customer to the air carrier, or agent for such air transportation, tour, or tour component." Airlines which violate this provision are subject to prosecution under section 411 of the Act, which can lead to imposition of a fine and a cease-and-desist order. When the Board first adopted section 399.84 in 1975, it applied only to tour operators, although the rule was amended in 1984 to cover all air carriers as well. *See Alaska v. Department of Transportation*, 868 F.2d 441, 442 (D.C. Cir. 1989)("*Alaska v. DOT*").

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[2] Section 5 of the FTC Act proscribes "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45(a)(1). The CAB was intended to be the only federal body able to regulate airline advertising because section 1107(f) of the 1938 Act, 52 Stat. 1028, now codified at 15 U.S.C. § 45(a)(2), amended section 5 of the FTC Act to bar the FTC from regulating airlines. That prohibition remains in effect today, leaving DOT as the sole federal agency able to regulate deceptive practices in the airline industry. The only change which Congress made to section 411 over the years was the addition of a new subsection (b) in 1984, which allows airlines to incorporate by reference in a ticket the full terms of the contract of carriage.

Even though this rule had been issued through notice-and-comment rulemaking proceedings, DOT decided in 1985 to bypass those procedures and to issue an order allowing airlines to exclude the $3 international departure tax from the advertised price and to disclose it only in the fine print. DOT Order 85-12-68 (24 December 1985). Various airlines went beyond this exemption, however, and began to relegate other charges to the fine print. Rather than take action against these violations, however, DOT rushed to embrace them.

In 1988 DOT issued two further orders pursuant to section 411, again bypassing the public rulemaking process. Order 88-3-25, issued 10 March 1988, allowed airlines to list separately "state foreign departure taxes, security charges, custom fees, immigration fees, security fees, agriculture inspection fees, tourism and fuel surcharges, as well as any other surcharges (when these items are collected by offeror) that may be imposed by the U.S. Federal, State or local governments or foreign governments," provided that the advertisements "conspicuously state elsewhere in the advertisement the amount of such charges and the services such charges cover and indicate that such charges must be paid by the customer in addition to the advertised price." Order 88-8-2, issued on 2 August 1988, clarified that airlines could unbundle only those charges which are levied on a per-passenger basis and not such items as fuel taxes which are levied directly on the airline.

Twenty-seven states sued DOT over these two orders, alleging that they were invalid because they were issued without public participation, as required by the Administrative Procedure Act. In January 1989, about the same time that this litigation was initiated, the District of Columbia Circuit agreed and invalidated the two 1988 orders in *Alaska v. DOT*, *supra*. In July 1989 DOT issued a Notice of Proposed Rulemaking ("NPRM") proposing to incorporate the 1988 orders into its advertising regulation. 54 Fed. Reg. 31052 (26 July 1989). The comment period has long since closed, but no final rule has yet been issued. In a 1989 consent order, however, entered before this NPRM was issued, DOT stated that it will not bring suit against airlines which unbundle surcharges in the manner proposed by the NPRM, even though such unbundling is barred by current DOT rules. DOT Order 89-4-25 at 2 n.1 (11 April 1989).

SUMMARY OF ARGUMENT

Texas' efforts to regulate airline advertising practices are not expressly preempted by section 105(a)(1) of the Federal Aviation Act. Congress adopted this provision as part of the Airline Deregulation Act, which ended federal controls over airline fares and routes. Having decided to replace this public utility-style of regulation with marketplace competition, Congress also decided that it would make no sense to leave room for similar regulation at the state or local level by allowing the states to impose their own views as to what was a reasonable fare or how many airlines should serve a particular route.

Section 105 was thus intended to foreclose those types of regulatory activities, but there is no evidence, either in the text of the statute or its history, that Congress intended to eliminate state consumer protection laws or other statues which the states were free to enforce prior to the Deregulation Act and which have continued vitality under the saving clause in section 1106 of the Act, which the Deregulation Act did not alter in any way.

In Part A, we demonstrate first why the Fifth Circuit erred in giving section 105 a broad reading which produces absurd results which Congress could not have intended and why section 1106 preserves the Texas statute at issue here. Part B examines the text and legislative history of the Deregulation Act and explains what Congress did intend to preempt, *i.e.*, those laws which affect licensing or operational decisions, and not state laws which have co-existed with federal law since 1938. Having shown that no congressional action can form the basis for a finding of preemption, either express or implied, Part C explains why Texas' deceptive practices law is not preempted by various actions taken by federal regulators dealing with airline advertising.

ARGUMENT

THE FEDERAL AVIATION ACT DOES NOT PREEMPT CONSUMER PROTECTION LAWS AND OTHER STATE LAW REMEDIES.

Preemption issues are ultimately resolved by determining

the intent of Congress, *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6 (1986); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985), and state law may be preempted in at least three ways. First, Congress may preempt state law expressly if such a "command is explicitly stated in the statute's language." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, preemption may be implied if federal law is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, state law may be preempted to the extent it "actually conflicts with a valid federal statute," *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), *i.e.*, if compliance with both regimes "is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or if state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941). *See also Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2481-82 (1991).

The court of appeals decided this case on express preemption grounds, but this brief will show why state efforts to regulate the airline advertising in question here are not preempted under any of those theories.

A. *The "Relating To" Language in Section 105 Should Be Read Much More Narrowly Than The Fifth Circuit Did.*

The Fifth Circuit concluded that Congress expressly preempted state regulation of airline advertising in 1978 when it enacted section 105(a)(1) of the Federal Aviation Act, which states:

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this chapter to provide air transportation.

49 U.S.C. App. § 1305(a)(1). The court of appeals read the "relating to [an airline's] rates, routes, or services" language as having the same broad meaning as similar "relating to" language in the preemption provision of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), *i.e.*, as preempting state laws which have "'a connection with or reference to'" an airline's rates, routes or services. Pet. App. at 33a, quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983)(emphasis added). This was error for several reasons.

First, the problems which the 93rd Congress sought to address in the pension area are not the same problems which the 95th Congress intended to address in the aviation field. *Shaw* examined the text and history of ERISA and found that Congress valued uniformity in the pension field to such an extent that it clearly wanted to extinguish state law and make federal law the sole source of a beneficiary's rights. *Id.* at 98-100. In this case, by contrast, we have a statute which preempts *and* generally preserves state laws, thus making ERISA's broad preemption language a poor guide for determining congressional intent. And, as a more general proposition, this Court's insistence in preemption cases that one must divine congressional intent and identify the specific problems that Congress wanted to solve makes it unlikely that comparing the text of one statute with the text of another statute from a wholly unrelated field will provide much assistance.

Second, the Fifth Circuit's reliance on *Shaw* overlooks this Court's caveat in that case that "relating to" should not be given a broad reading if there is "good reason to believe Congress intended the language to have some more restrictive meaning." *Id.* at 97. Indeed, this Court noted in a case decided the same day as *Shaw* that the ERISA preemption clause is "virtually unique." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 462 U.S. 1, 24 n.26 (1983). *Accord, Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 56 (2d Cir. 1988)(broad reading of ERISA's "relating to" language should be "confined to the ERISA regulatory scheme").

Third, giving section 105 a broad preemptive reach would produce absurd results which Congress could not possibly have intended. *Cf. English v. General Electric Co.*, 110 S. Ct. 2270, 2277 (1990). Suppose, for example, that a ticket agent deliberately and fraudulently overcharged a passenger. Or that a flight attendant

dumped a pot of hot coffee on a passenger's lap, causing serious physical injury. Or that an airline breached an explicit term of its contract with the passenger. Or that an airline operated an aircraft in a negligent fashion such that it crashed, killing all on board. In each case, state statutes or common law theories provide remedies for aggrieved passengers, yet under the approach taken by the Fifth Circuit, these remedies are preempted because they have a "connection with or reference to" an airline's "rates, routes, or services."

We are aware of no court which has held that these claims -- and all tort, contract or other claims arising under state law which somehow "relate" to airline rates, routes or services -- are preempted by section 105. Indeed, the Fifth Circuit's reasoning contains no limiting principle to help identify which state laws are not preempted because they lack a "connection with or reference to" airline rates, routes or services. As one court noted in rejecting a preemption claim in another advertising case, a broad reading of section 105 could "bar a building code provision that increased the cost of [an airline's] hanger facilities because that regulation added to its costs and -- ultimately -- the rate it charged its customers." *People of the State of New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F. Supp. 162, 176 (S.D.N.Y. 1989).[3]

The Fifth Circuit did acknowledge the enduring presence of

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[3] Although various airlines have argued that section 105 preempts state tort law in accident cases, that view has been uniformly rejected by the lower courts. *See In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colorado, on November 15, 1987*, 721 F. Supp. 1185, 1187 (D. Colo. 1988); *Elsworth v. Beech Aircraft Corp.*, 37 Cal. 3d 540, 208 Cal. Rptr. 874, 879, 691 P.2d 630, 634-35 (1984); *see also People v. Valenti*, 153 Cal. App. 3d Supp. 35, 200 Cal. Rptr. 862, 865 (1984)(criminal statute barring reckless operation of aircraft not preempted); *cf. In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th. Cir. 1983).

These cases illustrate another problem with a broad reading of the "relating to" language, namely, it would sweep off the board not only state enforcement actions, but also private tort actions seeking damages against an airline. DOT's power under section 411 extends only to issuing cease-and-desist orders, and the Deregulation Act did not create a federal remedy for passengers who have been defrauded, overcharged, bumped or subjected to other tortious practices. Nor, of course, is there a federal tort remedy to compensate victims of aircraft crashes and their families. Thus, under this reading, no damages remedy would be available in airplane accident cases.

the saving clause appearing as section 1106 of the Act, 49 U.S.C. App. § 1506, which has been on the books since 1938 and which states: "Nothing in this chapter [*i.e.*, the Act] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." The court found that section 1106 has no relevance because it "does not preserve state law remedies when there is express preemption" under section 105 (Pet. App. 33a). The court did not explain, however, how one was to determine which state laws Congress wanted to preempt under section 105 and which state laws it wanted to preserve under section 1106. If the Fifth Circuit's "connection with or reference to" reading of section 105 is correct, then section 1106 would be all but extinct. As we now explain, section 1106 has greater vitality than the Fifth Circuit acknowledged.

In 1976 this Court rejected a variation of the current preemption argument when it held that section 1106 preserves state law actions, even when there is a federal rule which addresses the issue in question. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). That case has considerable relevance here. The plaintiff in *Nader* was bumped from an oversold flight. Rather than accept the liquidated damages offered under a federal regulation, he elected to sue the airline, alleging the common law tort of fraudulent misrepresentation. The district court ruled in his favor, but the court of appeals reversed, holding that the doctrine of primary jurisdiction barred him from pursuing his suit until the CAB had completed an investigation of overbooking practices. *Id.* at 292-96.

This Court unanimously reversed, holding that section 1106 allows a passenger to pursue statutory and common law damage claims regardless of what may (or may not) be happening at the CAB. The Court found no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies." *Id.* at 299. It noted that section 411 empowers the CAB to investigate and issue a cease and desist order, a remedy which does not "represent the only, or best, response to all challenged carrier actions that result in private wrongs." *Id.* at 303. The Court concluded that state common law remedies may comfortably coexist with the federal government's authority under section 411, adding that the CAB had taken that view for a number of years.

Id. at 307 & n.18.[4]

In our view, section 1106, as construed by *Nader*, remains good law and provides the statutory foundation preserving state actions such as the ones at issue here. Section 1106 was not repealed when Congress passed the Deregulation Act in 1978, a curious omission if Congress really intended to preempt state laws having any "connection with or reference to" airline routes, rates or services. Nor did Congress repeal this section when it enacted the CAB Sunset Act in 1984. Thus, in order to accept the Fifth Circuit's broad reading of section 105's "relating to" language, it is necessary to conclude that section 105 implicitly repealed section 1106 by dint of its subsequent enactment. That claim is untenable and clashes with several canons of statutory construction which apply here.

In *Watt v. Alaska*, 451 U.S. 259 (1981), this Court construed "two statutes, each of which by its literal terms applies to the facts before us." *Id.* at 266. The Court declined simply to give priority to the statute which was passed later in time, noting its obligation to "ascertain the actual intent of Congress." *Id.* The Court explained, in language relevant here, how a reviewing court is to conduct that task:

> Our examination of the legislative history is guided by another maxim: "'repeals by implication are not favored,'" *Morton v. Mancari*, 417 U.S. [535] at 549 [(1974)], *quoting Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). "The intention of the legislature to repeal must be 'clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), *quoting Red Rock v. Henry*, 106 U.S. 596, 602 (1883). We must read the statutes to give effect to each if we can do so while preserving their sense and purpose. *Mancari*, *supra*, at 551;

[4] At the time of the *Nader* suit, the CAB rules (14 C.F.R. Part 250) allowed a bumped passenger to receive damages equal to the face value of the ticket, within a range of $25 and $200. 426 U.S. at 294-95. Later revisions to Part 250 retained that same basic approach, and at no point after *Nader* did the Board ever claim that Part 250 provides the exclusive remedy for overbooking and that alternative state law remedies are preempted. *See* 47 Fed. Reg. 52980 (24 November 1982); 43 Fed. Reg. 24277 (5 June 1978).

> *see Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

Id. at 266-67. *See also United States v. Fausto*, 484 U.S. 439, 453 (1988); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984).

Two other rules of statutory construction guide the inquiry. First, the burden is on the party arguing that a legislative act has changed existing law. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). Second, there is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States," such as regulation designed to protect consumers from unfair or deceptive practices, and thus Congress's intent to preempt this authority must be "'clear and manifest.'" *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989), *quoting Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230. *See also Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, 373 U.S. at 146.

Application of these principles to the present case compels a conclusion that section 1106 remains viable today. The legislative history of the Deregulation Act, which we discuss in more detail below, demonstrates no intent whatsoever to repeal section 1106 or to eliminate state law remedies.[5] Virtually every provision of the existing Act dealing with economic regulation was affected in some way or another by this law. During that debate, there was no call by industry representatives to repeal section 1106 or to overturn *Nader*, which was decided just as the legislative debate was starting. Indeed, one can search the more than 7000 pages of hearing transcripts, the committee reports, and the floor debates and find not a single mention of this issue, much less a "clear and manifest" indication to preempt state consumer protection laws. *English v. General Electric Co.*, *supra*, 110 S. Ct. at 2275.

The analysis we advance here -- which seeks to harmonize the savings clause with an express preemption provision -- finds

[5] The legislative history of this Act, save for the hearing transcripts, has been compiled by the House Committee on Public Works and Transportation into one volume entitled *Legislative History of the Airline Deregulation Act of 1978*, 96th Cong., 1st Sess. (May 1979)(Serial No. 96-5).

ample support in the case law. Indeed, this Court has taken care to give effect to savings clauses similar to section 1106 even when giving a broad preemptive effect to other provisions of the statute. *International Paper Co. v. Ouelette*, 479 U.S. 481, 497-98 (1987); *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491, 505-06 (1984). And in *Motor Vehicle Mfrs. Ass'n v. Abrams*, 899 F.2d 1315, 1319 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991), the court held that a federal law which expressly preempted state laws that "relate to" certain subjects was to be given a narrow reading, particularly in the face of a savings clause stating that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law."[6]

But if section 1106 does preserve state laws such as the one at issue here, what did Congress have in mind when it enacted section 105? To that question we now turn.

B. *Section 105 Applies Only in the Areas of Licensing and Operational Decisions.*

The text and history of the Deregulation Act indicate that Congress intended to inject more competition into the airline industry and to give the airlines, not the CAB, the final say in deciding what routes to serve and what rates to charge. As we now demonstrate, the thrust of the Deregulation Act was to end federal price and entry controls, and section 105 was intended to preempt the states from enacting their own. It is simply erroneous to equate a decision to preempt this element of airline economics with a decision to preempt all other forms of regulation, including state consumer protection laws.

Properly understood, Congress's intent was that the Deregulation Act would give the airline industry, which had previously been regulated as a public utility, the same freedom to compete which is available to "unregulated" industries, which of course are

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[6] We note in passing that section 1106 has an impressive pedigree, having been modelled on a similar provision of the Interstate Commerce Act of 1887, which regulated the railroads. *See Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915); *American Express Co. v. Teitel*, 119 Misc. 2d 822, 464 N.Y.S.2d 947 (Civ. Ct. 1983).

subject to the same state laws proscribing unfair and deceptive practices that the Fifth Circuit found to be preempted here. For most of this century the FTC and the states have shared responsibility for regulating unfair and deceptive practices of these "unregulated" companies, and it is generally accepted that these two systems of regulation coexist comfortably with each other. *See General Motors Corp. v. Abrams*, 897 F.2d 34, 36 (2d Cir. 1990); *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 989-91 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). Indeed, state laws on a subject can remain intact even if the FTC has adopted a trade rule dealing with the same subject. *Mobil Oil Corp. v. Attorney General*, 361 Mass. 401, 408-411, 280 N.E.2d 406, 412-14 (1972). Thus, a holding that airlines are immune from state laws regulating deceptive practices would grant airlines a special exemption which is not available to other industries.[7]

The Fifth Circuit cited bits and snippets of the legislative history for the proposition that Congress wanted to end "confusion" as well as "uncertainties and conflicts" which then existed as a result of twin systems of federal and state regulation. Pet. App. at 31a. However, the court failed to identify the specific problems Congress had in mind, and an examination of that history shows that state regulation of advertising was not one of them.

The hearings and reports accompanying the Deregulation Act indicate that Congress was trying to address several specific problems. The first was the effort by some states to regulate *intra*state operations of interstate airlines. For example, Pennsylvania authorities disallowed fares on flights between Philadelphia and Pittsburgh which had been approved by the CAB. The California PUC was also trying to regulate the fares of interstate airlines flying intrastate routes and was threatening to shut down a federally approved helicopter carrier which sought to ferry passengers between airports and downtown areas in Los

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[7] The long-standing nature of this dual system of regulation buttresses our claim here, especially in light of this Court's comment that "[w]e may profitably look to judicial interpretation of § 5 [of the FTC Act] as an aid in the resolution of . . . questions raised under § 411." *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 82 (1956).

Angeles and San Francisco. Senate Report at 98.[8]

A second question was whether and to what extent airlines such as PSA and Southwest, which in 1978 operated solely in one state, would be subject to state regulation if they obtained authority to fly interstate routes.[9] A third issue was whether intrastate flights which, for air traffic control reasons, had to pass over the airspace of another state or fly more than three miles off shore should be viewed as interstate or intrastate operations.[10]

The "relating to rates, routes, or services" language of section 105 first surfaced in 1976 as part of a CAB-drafted reform bill. The Board explained that this section was added "to make clear that no state or political subdivision may defeat the purposes of the bill by regulating interstate air transportation. This provision represents a codification of existing law and leaves unimpaired the states' authority over intrastate matters."[11] In June 1977, Lee West, the Acting Chairman of the CAB testified that the Board hoped that "state regulatory agencies would not seek to initiate or increase air transport regulation at the time that Federal regulation is being loosened or withdrawn and thus frustrate the intent of Federal regulatory reform legislation." 1977 House Hearings at 353. Section 105 was proposed so that "the States not move into the void that we more or less create by any withdrawal, under the various proposals, from regulation." *Id.* at 354. He found it likely, however, that "as the Federal Government withdraws from the economic regulatory arena, the States will become increasingly active in areas which have historically been of local concern, *such as consumer protection . . .*" (emphasis added). *Id.* at 353.

During hearings on this proposal and others, airline officials complained that there should be even greater preemption, citing the problems outlined above, while state regulators objected to what they saw as a proposal to eliminate their ability to control intrastate operations. Over the course of that debate, no airline witness complained about state regulation of advertising, nor was the threat of state law liability after *Nader* cited as something which Congress should eliminate, leaving federal law as the only source of a remedy for bumped passengers.[12]

The initial Senate version of the Deregulation Act contained language similar to what is now found in section 105(a)(1), which the CAB supported on the ground that it "would only preclude state regulation which could frustrate the intent of Federal regulatory reform legislation by substituting state utility-type regulation for Federal regulation being loosened or withdrawn."[13] A section-by-section summary of that bill, prepared by the Senate Commerce Committee and cited by a number of witnesses, indicated that this was what the proposed section 105 was in-

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[8] *See also Aviation Regulatory Reform: Hearings before the Aviation Subcomm. of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 263-64 (1977)(statement of Public Utilities Commission of Pennsylvania)("1977 House Hearings").

[9] *See Regulatory Reform in Air Transportation: Hearings before the Aviation Subcomm. of the Senate Comm. on Commerce, Science and Transportation*, 94th Cong., 2d Sess. 1306-07 (1976)(testimony of National Association of Regulatory Utility Commissioners)("1976 Senate Hearings").

[10] *See Regulatory Reform in Air Transportation: Hearings before the Aviation Subcomm. of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 140-41 (1977)(separate statement of CAB Member G. Joseph Minetti)("1977 Senate Hearings"). *See also Reform of the Economic Regulation of Air Carriers: Hearings before the Aviation Subcomm. of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 1273-74 (1976)(statement of National Association of Regulatory Utility Commissioners)("1976 House Hearings").

[11] The CAB bill was introduced upon request as S. 3536, the Aviation Amendments of 1976, and is reproduced in the 1976 Senate Hearings at 119-60, as well as in the 1977 House Hearings at 197-230. The preemption language is in section 4 of the CAB bill, 1977 House Hearings at 200, and the quoted language from the Board's summary analysis appears in the 1977 House Hearings at 243.

[12] For examples of airline complaints about state economic regulation, *see* 1976 Senate Hearings at 780 (statement of Allegheny Airlines) and 1977 House Hearings at 679 (statement of Western Airlines). For examples of complaints by state regulators that proposed section 105 was going too far, *see* 1977 House Hearings at 1059-60 (statement of California Public Utilities Commission) and 1977 Senate Hearings at 1248 (statement of National Association of Regulatory Utility Commissioners).

[13] The initial Senate version of the Deregulation Act was S. 689, 95th Cong., 1st Sess. (1977), reproduced at 1977 Senate Hearings at 55-96, with proposed section 105 reproduced at page 63 of those hearings. The CAB testimony quoted in the text appears at page 191 of those hearings.

tended to do.[14] The Senate bill which emerged from committee and was approved by the Senate barred states from "determining routes, schedules, or rates, fares, or charges in tariffs, of, or otherwise promulgate economic regulations for" any airline licensed by the CAB, and it clarified the interstate/intrastate regime by stating that intrastate carriers such as PSA and Southwest could continue to be subject to state regulation until such time as they earned at least 50 percent of their revenues from interstate operations. S. 2493, § 17, 95th Cong., 2d Sess. (1978), *reprinted in* Senate Report at 39.[15]

The Senate Report nowhere suggests that state consumer protection laws (or other laws, for that matter) are contributing to what the Report termed (at 98) a "confusing system of dual regulation of federally certificated air carriers that has evolved in some States." This omission is noteworthy, since *Nader* -- decided while the deregulation debate was underway -- specifically endorsed a "system of dual regulation" in the area of overbooking and made it clear that even with a federal rule on the books, airlines which overbook their flights could nonetheless be subjected to the differing liability and damages regimes in the 50 states.

Both the initial and final House versions of the Deregulation Act contained the "relating to rates, routes, or services" language first recommended by the CAB, along with section 105(c) which clarified that previously intrastate airlines would be subject only to federal regulation once they obtained a CAB certificate.[16] The

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[14] *See* 1977 Senate Hearings at 1267 (statement of California Public Utilities Commission); *id.* at 1291 (statement of AFL-CIO).

[15] The 50 percent provision sought to remedy another regulatory anomaly. *Intra*state fares in California and Texas were lower than *inter*state fares for flights of comparable distances, and airlines such as PSA and Southwest were deterred from seeking a CAB license to fly interstate routes because they would be forced to charge the higher CAB-mandated fares on their intrastate flights. The 50 percent provision was designed to give intrastate carriers some flexibility to operate outside their home state without having to boost fares on their intrastate routes. Senate Report at 99.

[16] The initial House version was H.R. 8813, 95th Cong., 1st Sess. (1977), (cont'd)

House Report explained (at 15) that section 105 was intended to clarify "the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service." It added that the existing law had "created uncertainties and conflicts," with airlines being required to charge different fares for passengers traveling between two cities on the same airplane, depending on whether they were interstate or intrastate passengers. *Id.* at 16. *See People of the State of California v. CAB*, 581 F.2d 954 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979). Thus, section 105 was intended to "prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services." House Report at 16.[17] The conferees adopted the House provision as the final version of section 105(a)(1), and the Conference Report contained no new commentary. H.R. Conf. Rep. No. 95-1779, 95th Cong., 2d Sess. 95 (1978).

Section 105 thus reflects an attempt to preclude the states from making the sort of public utility-style licensing and operational decisions which the CAB had previously made. Having decided to get the federal government out of the business of telling airlines where to fly and how much to charge, Congress did not want the lack of federal regulation to be seen as a license for the states to embark on such efforts. Yet on the precise question raised here, there is not a shred of evidence that Congress intended to preempt state laws which do not impinge on airline

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section 3 of which proposed adding the "relating to rates, routes, or services" language of section 105. 1977 House Hearings at 56. The final House version of section 105, as passed by the committee and approved by the full House, is H.R. 12611, § 4, 95th Cong., 2d Sess. (1978), *reprinted in* House Report at 40.

[17] The bill thus addressed the specific problems identified during the hearings. By stating that an airline which obtains a CAB license is subject only to CAB regulation, the bill clarified the status of previously intrastate companies such as PSA and Southwest when they obtained interstate operating authority. The bill also made it clear that "service between two cities in a State is not subject to CAB jurisdiction solely because the aircraft passes over places outside the State." House Report at 16. The House report did not mention state laws of the sort at issue here as a source of the "uncertainties and conflicts" which Congress sought to remedy.

operations in this way.[18]

The Fifth Circuit tried to bootstrap its conclusion that preemption was intended in 1978 by examining the CAB Sunset Act, which Congress passed six years later, and purported to find support for its broad reading of section 105 there. Pet. App. 32a. This argument is curious since the 1984 Act did not amend section 105 or section 1106, and one cannot rely upon subsequent legislation to explain the intent of a prior Congress. More fundamentally, the argument does not withstand scrutiny because the Fifth Circuit failed to identify the problem that Congress was trying to

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[18] Congress's use of the word "services" in section 105 does not suggest that this provision has a broader reach. Indeed, the portions of the House Report cited in the text describe various "services" covered by section 105, and elsewhere in the Act the word refers to various airline operations that are offered to the public, *e.g.*, scheduled passenger, charter cargo, air ambulance and other types of "services." *See* Federal Aviation Act § 404(a), requiring the provision of "safe and adequate service, equipment, and facilities," as well as "reasonable through service" with airlines offering connecting service (49 U.S.C. App. § 1374(a)); *id.*, § 401(e)(6), allowing scheduled carriers to perform charter trips or other "special service" (49 U.S.C. App. § 1371(e)(6)).

Similarly, under CAB licensing rules in effect at the time of the Deregulation Act or adopted to implement its provisions, anyone seeking a license to operate an airline must file a "statement as to the type of aircraft applicant proposes to use in the new service...." 14 C.F.R. § 201.4(c)(5). An airline's "route authority" includes the right "to provide service between and among various points except service which has been designated as essential air service [*i.e.*, the small community service program]." *Id.*, § 204.2(l). A "substantial change in operations" is defined as "changes in operations from charter to scheduled service, cargo to passenger service, or short-haul service to long-haul service, or a large increase in the number of markets served." *Id.*, § 204.2(m). Applicants wishing to operate as a small air taxi must describe the "type of service the carrier will offer (scheduled passenger, scheduled cargo, mail under a U.S. Postal Service contract, on-demand passenger, on-demand cargo, or other service such as air ambulance operations, firefighting or seasonal operations)." *Id.*, § 298.21(c)(iv).

Also, a 1979 CAB policy statement states that certain "services" which are offered "as a *quid pro quo* for passenger's fare" cannot be regulated by the states, *e.g.*, such as flight frequency, in-flight smoking or meal service. 44 Fed. Reg. 9948, 9951 (col. 1)(15 February 1979). As Part C discusses in more detail, this rule may prevent states from telling airlines *what* to offer their customers, but it does not preempt state remedies if those offerings are made in a deceptive manner, as Texas claims here.

solve in 1984.

The problem Congress confronted in 1984 was that section 411 was slated to "sunset" at the end of that year; if that occurred, the federal government would be unable to police anti-competitive and unfair or deceptive practices in the airline industry. *See* p. 4 and note 2, *supra*. In practical terms, the demise of section 411 would also mark the end of CAB rules in such areas as overbooking, liability limitations for lost or damaged baggage, terms of charter service, and notice to passengers regarding the terms of their contracts. H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4 (1984)("House Sunset Report").

The CAB Sunset Act responded to this problem by simply transferring to DOT the CAB's enforcement and rulemaking authority under section 411, along with the CAB's existing consumer protection rules. 49 U.S.C. App. §§ 1551(b)(1)(E), 1556(a). In language which is relevant here, the House Sunset Report expressed the view (at 4) that "there should continue to be authority in the Federal government to protect consumers against unfair and deceptive practices," adding that while existing "regulations touch relatively limited areas of airline operations they furnish important protections for consumers and we do not wish to see these regulations end precipitously when CAB sunsets."

It was in that context -- the anticipated demise of these CAB rules -- that the House Sunset Report then talked about uniformity and how existing CAB regulation "insures a uniform system of regulation and preempts regulation by the states." *Id.* The Report spoke of the need to avoid "confusion and burdensome" situations for passengers if the federal government withdrew "precipitously" from the field and the 50 states tried to restore the *status quo* by adopting their own rules on baggage liability limitations, terms of charter service, etc. *Id.*

Thus, the concern about uniformity which the Fifth Circuit cited does not reflect a desire by Congress to freeze the states out of consumer protection activities entirely. Instead, the concern was over the lack of uniformity which would result if (1) *existing* federal rules were swept off the board, (2) the states tried to fill the gap in a manner which produced conflicting and inconsistent obligations on the airlines, *and* (3) the federal government had no statutory power to address the situation. This last point is crucial because, as the House Sunset Report conceded (at 4), the CAB's

consumer protection rules covered only a limited range of activities, and, at least prior to the current wave of litigation over preemption, it was clear that state laws provided other avenues for seeking redress if there were no federal rule on the subject and sometimes (as in the overbooking area) even if there is a federal rule which deals with a particular issue.

Thus, the legislative history establishes at most an intent (1) to avoid having *no* federal statutes or rules covering those unfair or deceptive practices which the federal government regards as worthy of federal regulation, (2) to preserve uniformity in those areas where there *is* a federal rule on the books, and (3) to assure that the federal government retains the statutory authority to police consumer problems in the future, as the need may arise. *Id.* But it requires a considerable leap -- and one not supported by the text or history of the 1978 and 1984 acts -- to say that Congress wanted the states to be totally ousted from their traditional consumer protection role in cases such as this.

One case which nicely captures the distinctions between what Congress did and did not intend to preempt is *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep't of Health*, 389 N.W.2d 507 (Minn. 1986), where section 105 was held to preempt a state health department from denying an operating license to an air ambulance company. The court added that section 105 does not, however, oust a state from its "traditional role in the delivery of medical services -- the regulation of staffing requirements, the qualifications of personnel, equipment requirements, and the promulgation of standards for maintenance of sanitary conditions," *id.* at 509, even though such rules arguably "relate to" the air ambulance "service" being offered.

One final point needs to be considered in assessing the reach of section 105, namely, that this statute is not the only weapon in the federal government's preemption arsenal. Thus, a court need not strain to fit state laws into the section 105 pigeonhole for fear that inconsistent and conflicting state law obligations will otherwise be imposed on the industry. In the consumer protection area, a properly enacted DOT rule may preempt state laws, either when the federal rule shows an intent to occupy the field or when an airline would be subject to inconsistent or conflicting requirements. *But see Nader v. Allegheny Airlines*, *supra* (presence of a federal rule does not automatically cuts off state remedies for

bumped passengers).

Moreover, other provisions of the Act may preempt state laws which "relate to" airline "rates, routes, or services" in some abstract sense. This point is illustrated by *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989), where an airline pilot argued that he could not be tested for drugs under a state law barring such testing. Rather than debate whether this state law somehow "relates to" the airline's rates, routes or services, *id.* at 3, the court focused on other provisions of the Act dealing with air safety and pilot qualifications, and it found preemption based on the fact that Congress had stated an "unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law." *Id.* at 6.[19]

These arguments explain why there is no basis to conclude that Congress has preempted the state laws at issue here, either expressly or based on some implicit intent to occupy the field. Nor, as we now show, can preemption be based on any regulatory actions taken by the CAB or DOT in administering section 411 of the Act.

C. *No Regulatory Action Preempts Texas' Claims Here.*

It has been argued in litigation over this issue that, apart from section 105, preemption can also be found on the basis of three orders issues by federal agencies: a 1979 CAB policy state-

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[19] Air safety is regulated under Title VI of the Act (49 U.S.C. App. §§ 1421 *et seq.*), which the Deregulation Act did not alter. *See* 49 U.S.C. App. § 1307. The federal government has exclusive authority to regulate safety, *see Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960); *World Airways, Inc. v. International Bhd. of Teamsters*, 578 F.2d 800, 803 (9th Cir. 1978), although state tort law governs in the event of an airplane accident or similar occurrence caused by unsafe practices. *See* pp. 9-10 & n.3, *supra*.

For example, one case which could have found preemption without regard to section 105 is *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989), where a passenger sued after an airline refused to board him because of allegedly drunk and disorderly conduct. Preemption could have been found under 49 U.S.C. App. § 1511, which allows an airline to refuse transportation "when, in the opinion of the carrier, such transportation would be inimical to safety of flight."

ment which preempted various areas of airline operations, but did not mention advertising; a 1989 DOT proposal to amend its policy statement against unbundling, which is not yet final; and a 1989 settlement order setting forth a statement of DOT's prosecutorial policies. *See* pp. 5-6, *supra*. Before explaining why none of these actions preempts the state's claim, there is one overall point which applies to all three orders.

This Court has been willing to find that a federal *statute* preempts state law even if no preemptive intent is expressly stated. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). The Court has, however, hesitated to find that a rule or order issued by a federal *agency* has preemptive intent unless that intent is clearly and definitively spelled out. As was explained in *Hillsborough County v. Automated Medical Laboratories, Inc.*, *supra*, "agencies normally address problems in a detailed manner," more so than is possible when a legislative body is writing a statute, and thus "we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." 471 U.S. at 718. Further, if "an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to preempt." *Id. Accord, California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987); *North Dakota v. United States*, 110 S. Ct. 1986, 1998 (1990). Indeed, in those cases where regulatory preemption was found, the Court noted that the rule at issue expressed a clear preemptive intent. *E.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 705 n.10 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuestra*, 458 U.S. 141, 154-59 (1982). With these standards in mind, we take each order in turn.[20]

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[20] Before doing so, though, we note that a pending certiorari petition which involves section 105 also raises a regulatory preemption issue of the sort discussed in the text. If the Court should reach the issue of regulatory preemption in this case, we respectfully ask it to do so with this other case in mind.

In *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1991), *pet. for cert. pending*, No. 91-505, the court held, without citation of authority, that federal overbooking rules preempt state laws allowing a bumped passenger to seek punitive (cont'd)

1. *The 1979 CAB Policy Statement.* Four months after the Deregulation Act took effect, CAB adopted 14 C.F.R. § 399.110 (1991), a policy statement which spelled out the reach of section 105, including a statement to the effect that the Board was "occupying the entire field of economic regulations" with respect to the industry, 44 Fed. Reg. 9948 (col. 3)(15 February 1979). A close reading of this policy statement and its preamble discloses, however, that, whatever other areas may be preempted by this policy statement, advertising is not one of them.

The Board's preamble to this policy statement construes section 105 the same way that we do here. Thus, the Board stated that a state "may not interfere with a federal carrier's decision on how much to charge or which markets to serve," nor may it "establish licensing requirements" or require airlines "to adopt any particular rate." 44 Fed. Reg. 9951 (col. 1). Among the areas specified as off-limits to state regulation efforts are in-flight smoking, liability regulation for baggage loss, and charges for headsets, alcoholic beverages and entertainment. *Id.* The Board added that this preemption extends to "all of the economic factors that go into the provision of the *quid pro quo* for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing; and we hereby occupy *these* fields completely." *Id.* (emphasis added).

Conspicuously absent from this list of "fields" being "com-

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damages. *West* concluded that a punitive damages award would punish the practice of overbooking, which the federal rules allow, and that therefore punitive damages claims must be preempted to avoid a supposed conflict. *Id.* at 661. The error there, apart from overlooking punitive damages cases such as *Silkwood v. Kerr-McGee Corp.*, *supra*, and *California v. ARC America Corp.*, *supra*, is that the conduct which the bumped passenger challenged was not overbooking, but the airline's failure to pick up the telephone and advise him of changed conditions which increased the odds that he would be bumped. Thus, as in *Nader*, a punitive damages award would not punish the act of overbooking, but failure to provide proper notice, a distinction the court of appeals overlooked. *West* also failed to follow *Hillsborough County* when it found regulatory preemption even though the CAB and DOT have never in 30 years of rulemaking purported to preempt *any* state law. *See* note 4, *supra*. Indeed, federal overbooking rules require airlines to tell bumped passengers that they may pursue state law remedies and never hint that punitive damages may be unavailable. 14 C.F.R. § 250.9(b)(1991).

pletely" occupied is state regulation of unfair or deceptive practices, both generally and with specific reference to advertising. This omission buttresses our point. It is one thing to give airlines the freedom to decide *what* "rates, routes, or services" to offer the public as the *quid pro quo* for a passenger's fare. It is something else to preempt state laws which affect *how* those services are advertised in order to protect the public from deceptive or other tortious conduct. A few examples illustrate the point.

Under both section 105 and the 1979 policy statement, states may not, for example, adopt a law requiring airlines to pay passengers liquidated damages in the amount of $1000 if they are bumped from an oversold flight, when the federal rules prescribe a maximum recovery of $400. That does not mean that state tort remedies of the sort recognized in *Nader* are preempted, and as we observed at note 4, *supra*, neither the CAB nor DOT has ever regarded its rules as the sole remedy for bumped passengers. So too, a state cannot require that vegetarian meals be served on all flights, but that does not mean that a passenger who contracts food poisoning from either vegetarian or any other airplane food lacks a tort remedy under state law. And of course, a state may not set air safety standards, but that fact would not affect an airline's tort liability to its passengers in the event of a crash. Thus, while a state cannot tell an airline what fare to charge for its services, it can seek to assure that the fare set by the airline -- whatever it may be -- is advertised in a truthful and non-misleading fashion. *See Abrams v. TWA*, *supra*, 728 F. Supp. at 176.

2. *DOT's 1989 Notice of Proposed Rulemaking.* It has also been argued below that preemption can be found on the basis of a Notice of Proposed Rulemaking issued by DOT in 1989 (*see* p. 6, *supra*), which proposed amending the current policy statement which prohibits unbundling (14 C.F.R. § 399.84) to make it clear that taxes and surcharges could be unbundled from an airline's price advertising without violating section 411. The theory is that the NPRM represents DOT's current thinking, even though the current policy statement makes it quite clear that unbundling is illegal under both federal, as well as state guidelines.

There is no authority that *proposed* rules can have preemptive effect, even though final rules may preempt state law. Moreover, notice and an opportunity to comment on proposed rules are not mere technicalities, but an essential ingredient in the federal

rulemaking process, required by considerations such as fundamental fairness. Regulations have the same effect as statutes and should be enacted publicly and with public participation; an agency's decision to bypass this requirement can thus result in a court striking down a federal rule in its entirety. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). Indeed, that is what happened in *Alaska v. DOT*, where the District of Columbia Circuit overturned DOT's attempt to amend the existing policy statement on advertising without going through notice-and-comment rulemaking. *See* p. 5, *supra*.

Moreover, the Administrative Procedure Act requires federal agencies to consider and respond to all comments received on a proposed rule, including those arguing against the proposal. To avoid having the rule struck down under the APA, an agency must "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Rodway v. U.S. Dep't of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975)(footnote omitted); *see also Telocator Network v. FCC*, 691 F.2d 525, 545 (D.C. Cir. 1982). Thus, a proposed rule has no more legal force than a bill which has passed both houses of Congress, but has not been signed by the President.

3. *The 1989 Consent Order.* Nor can preemption rest on the 1989 consent order settling a false advertising case in which DOT stated that it does not intend to prosecute violations of the unbundling prohibition in § 399.84. *See* p. 6, *supra*. Passing the serious due process questions which are present if an agency seeks to preempt state law through adjudication, rather than public rulemaking, DOT's statement about its intentions is not a binding adjudication which has the force of law, but a non-reviewable statement of prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821 (1985). Moreover, since DOT has chosen to articulate its advertising policy through rulemaking, it cannot, for preemption purposes and consistent with the Administrative Procedure Act, undo that policy by any means other than rulemaking. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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